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2009 OCT -7 P 4:27

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ARIZONA CORPORATION COMMISSION

BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE FORMAL
COMPLAINT OF CHARLES J. DAINS
AGAINST RIGBY WATER COMPANY

DOCKET NO. W-01808A-09-0137

**RIGBY WATER COMPANY'S
RESPONSE TO COMPLAINANT'S
MOTION TO COMPEL**

Complainant's Motion to Compel should be denied. The Motion and the underlying, tardy Data Requests are nothing more than an attempt to sidetrack this matter with a fishing expedition into irrelevant matters related to the City of Avondale's pending condemnation case concerning certain of Rigby Water Company's assets in Avondale. There is no basis for Complainant's assertion that Rigby Water Company's interactions with Avondale or Rigby's internal work product and settlement discussions related to the condemnation case are relevant to the present dispute. Indeed, the Motion and Data Requests demonstrate that this matter is essentially an attempt by Complainant Dains to leverage an advance payoff of condemnation proceeds from Rigby Water Company to which Dains is not contractually or legally entitled. As a result, Dains' Motion should be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

In October 2006, after the City of Avondale had publicly discussed acquiring Rigby's assets in Avondale, Dains lodged an informal complaint with the Commission raising the exact same issues raised in the present proceeding. Rigby responded to that complaint by

1 providing an accounting relating to payments made to Dains, along with a copy of the
2 Agreement, to the Commission. The Commission took no action on Dains' informal
3 complaint, and Dains never objected to the inaction.

4 Approximately two and a half years later, on March 19, 2009 (just six weeks after
5 Avondale filed its condemnation case in Maricopa County Superior Court)¹, Dains filed a
6 formal complaint ("Complaint") with the Commission alleging the same grounds for relief
7 that had been previously considered and not acted upon by the Commission. Rigby
8 responded to the Complaint in April of 2009, and in its Answer and Motion to Dismiss
9 expressly indicated that its negotiations with the City of Avondale (including the possibility
10 of condemnation) were irrelevant to the present dispute. [See Answer (4/13/2009).] On
11 June 2, 2009, a procedural conference was held. During that conference, ALJ Yvette
12 Kinsey ordered the parties to discuss the possibility of settlement and file a notice as to the
13 outcome of those discussions. In between his March initial filing and the June Procedural
14 Conference, Dains never propounded any Data Requests. The parties filed a joint status
15 report on June 29, 2009 indicating that the matter had not settled. Following the filing of
16 that report, Dains took no further action with respect to this matter, including serving any
17 Data Requests.

18 On September 15, 2009, ALJ Kinsey issued a second procedural order setting this
19 matter for a hearing on October 29, 2009. Eight days later, on September 23, 2009—more
20 than six months after filing his complaint—Dains sent the disputed Data Requests to Rigby
21 and requested that Rigby respond by October 2, 2009, even though the objections to and
22 nature of Rigby's responses to them were already well known. Rigby served its inevitable
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26 ¹ The condemnation case, No. CV2009-003060, is freely accessible on the Maricopa
27 County Superior Court website,
28 www.superiorcourt.maricopa.gov/docket/civilcourtcases/caseinfo.asp, and all of the
pleadings are publicly and freely accessible and have been at all times by Dains.

1 and consistent responses and objections on Dains on October 2, 2009, in accordance with
2 his accelerated timeline.

3
4 **II. ARGUMENT**

5 Dains' allegation that Rigby's responses and objections to his Data Requests were
6 made in bad faith is without basis. Dains waited until one week after a hearing was
7 scheduled and more than six months after filing his complaint to even propound discovery.
8 Because of his own delay in seeking discovery, he placed accelerated time limitations on the
9 responses. Moreover, the Data Requests either sought information that Dains already knew
10 or should have been known in the exercise of reasonable diligence, or information that
11 Rigby had consistently and correctly indicated was irrelevant since Rigby's initial
12 appearance in this matter.

13 **A. The Requested Information is Not Relevant to the Present Dispute.**

14 Dains' unsupported assertions as to the relevancy of information related to the City's
15 efforts to acquire Rigby's Avondale assets should be rejected. Information is relevant only
16 when it has "any tendency to make the existence of any fact that is of consequence to the
17 determination of the action more probable or less probable than it would be without the
18 evidence." Ariz. R. Evid. 401. Here, the nature and status of Rigby's negotiations with the
19 City, the availability of publicly available records regarding efforts by the City to condemn
20 Rigby, and Rigby's opinion of a "fair purchase price," an term that is not defined in statute
21 nor by Dains, is not relevant to whether or not Rigby has complied with Commission Rules,
22 whether Dains' own actions bar the present complaint, whether Dains' Complaint is barred
23 by the relevant statute of limitations or the Commission's prior consideration of his informal
24 complaint, or any other matter at issue in this proceeding.

25 Dains argues that the requested information is relevant because (1) proceeds from
26 any acquisition would provide "ample funds to resolve Rigby's dispute with Mr. Dains",
27 and (2) condemnation of Rigby might deprive the Commission of jurisdiction over the
28 present matter. But the Commission should not convert this hearing into a collection matter

1 before the administrative hearing has even been held, let alone a Decision and Order
2 entered. In essence, Dains seeks to recoup all of the funds that he allegedly invested in the
3 Tierra Ranchettes water system, whether or not he is contractually or legally entitled to such
4 funds, and bases his present Motion on the prospect of eventually obtaining such relief. As
5 set out in Rigby's Answer and Motion to Dismiss, however, Dains' request has no basis in
6 law.

7 As noted in Rigby's Answer, Dains has not and cannot allege that Rigby has failed to
8 abide by the terms of the mainline extension agreement between the parties. Nor can he
9 allege that Rigby will not abide by the terms of that agreement, whatever the outcome of the
10 City's efforts to acquire Rigby's Avondale assets. Instead Dains erroneously presumes that
11 he is entitled to recoup all amounts he allegedly invested in constructing the Tierra
12 Ranchettes system under the parties' mainline extension agreement. As the Commission is
13 well aware, the vast majority of mainline extension agreements do not result in full
14 repayment of the costs advanced by a developer. Indeed, Commission Rule R14-2-406(D)
15 expressly provides that "the "balance remaining at the end of the ten-year period set out
16 shall become non-refundable, in which case the balance not refunded shall be entered as a
17 contribution in aid of construction" The parties' agreement expressly recognized that
18 Dains might not fully recover the alleged construction costs of the Terra Ranchettes system.
19 [Complaint, Exh. A, § 16.] As a result, Dains is not, consistent with normal utility practice,
20 entitled to fully recoup his alleged costs under the parties' agreement. The City's potential
21 acquisition of Rigby's Avondale assets (and the information related to that acquisition
22 sought by Dains) is thus irrelevant to Dains' claims.²

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26 ² Additionally, Rule 408, Ariz. R. Evid., generally excludes settlement discussions
27 from consideration by a tribunal. Because disclosure of such privileged discussions is not
28 reasonably calculated to lead to the discovery of admissible evidence, Dains' requests with
respect to negotiations between the City of Avondale and Rigby should be denied.

1 Nor is the Commission going to lose jurisdiction over Rigby in the Superior Court
2 condemnation action. That matter is in its nascent stages and this dispute will likely be long
3 resolved before the condemnation action runs its course. Even if a judgment were recovered
4 by Rigby, Dains would retain any rights he had at that point. The jurisdictional argument is
5 a pretext to seek confidential and work product information from Rigby to use in an attempt
6 to leverage a settlement of this case, and is bait that Rigby is not going to take.

7
8 **B. The Information Sought is Privileged and Confidential.**

9 In addition to being irrelevant, much of the information Dains seeks is privileged or
10 highly confidential. For example, Dains seeks information concerning the status of
11 settlement negotiations between the City and Rigby, including the amounts discussed. He
12 further seeks Rigby's opinion of the "fair purchase price" for Rigby. While that term is not
13 defined in eminent domain law or by Dains, the owner's opinion of fair market value is
14 obviously highly confidential outside a pending condemnation suit (even if one had been
15 reached here, which Rigby has not, as already disclosed in the responses served on Dains).
16 Absent a compelling reason for disclosure, which Dains has not provided, disclosure of such
17 confidential and irrelevant information is not justified. See Ariz. R. Civ. P. 26(c)(7)
18 (permitting court to deny or place limitations on disclosure of confidential commercial
19 information); see also, e.g., Centurion Industries, Inc. v. Warren Steurer and Assoc., 665
20 F.2d 323, 325 (10th Cir. 1981) (to justify disclosure of confidential or trade secret
21 information, information sought must be shown to be both relevant and necessary). While
22 Dains now offers to enter into an appropriate protective order, that offer does not justify
23 disclosure of the requested information given its patent irrelevance to the Commission's
24 consideration of the present dispute.

25 **III. CONCLUSION**

26 Dains has not demonstrated that his Data Requests (specifically, those that remain
27 that seek information that is not otherwise available publicly, or have not already been
28 responded to by Rigby, which leaves solely No. 1-1 at issue) seek information that is

1 relevant to the present matter. Moreover, they seek highly confidential and privileged
2 material. Absent a compelling reason, which is not present in the Motion, Dains' Motion to
3 Compel should be denied.

4 RESPECTFULLY SUBMITTED this 7th day of October, 2009.

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7
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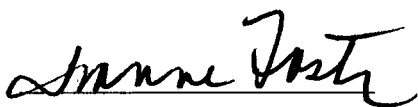
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